

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

SCOTT AND RHONDA BURNETT,)
RYAN HENDRICKSON, JEROD BREIT,) Civil Action No.
SCOTT TRUPIANO and JEREMY) 4:19-cv-00332-SRB
KEEL, on behalf of themselves)
and all others similarly)
situated,)
Plaintiffs,)
v.)
THE NATIONAL ASSOCIATION OF)
REALTORS, REALOGY HOLDINGS)
CORP., HOMESERVICES OF)
AMERICA, INC., BHH AFFILIATES,)
LLC, HSF AFFILIATES, LLC,)
RE/MAX LLC, and KELLER)
WILLIAMS REALTY, INC.)
Defendants.)

VIDEOTAPED ZOOM DEPOSITION - CLIFFORD D. NIERSBACH
CHICAGO, ILLINOIS

Wednesday, January 26, 2021

9:24 a.m.

Job 4995607

1 THE VIDEOGRAPHER: Today is Wednesday,
2 January 26, 2022. We'll go on the record at
3 9:24 a.m.

4 Will the court reporter please swear the
5 witness.

6 (Witness sworn.)

7 CLIFFORD D. NIERSBACH,
8 having been duly sworn, was examined and testified
9 as follows:

10 EXAMINATION

11 BY MR. KETCHMARK:

12 Q Can you please state your name.

13 A Clifford D. Niersbach.

14 Q Mr. Niersbach, my name is Michael
15 Ketchmark, and you understand I'm an attorney who
16 is up here from Kansas City, Missouri, for
17 purposes of taking your deposition in a lawsuit
18 which is pending in court down there?

19 A I do.

20 Q And during the deposition, it's always
21 important that you answer with words, audibly,
22 okay?

23 A I'll try to do that.

24 Q And it's important that we don't talk over
25 each other at the same time, okay?

1 support the concept.

2 That's what it states, correct, sir?

3 A Yes, sir.

4 Q And as part of this Exhibit 600, there's
5 an attachment that you would have received on the
6 proposal to the Professional Standards Committee
7 of the National Association of REALTORS.

8 Do you see that?

9 A I do.

10 (Exhibit 601 is introduced for the
11 record.)

12 BY MR. KETCHMARK:

13 Q And also if we go to Exhibit 601, that's
14 the same proposal that's attached. It's just in a
15 standalone document, and I plan on walking through
16 this proposal with you by using Exhibit 601, okay,
17 sir?

18 A Yes, sir.

19 Q We see in here Ms. O'Connor states:

20 In 2008, I had the honor and privilege of
21 being named to the NAR Pro Standards Committee.
22 It was my one chance to make a difference and a
23 chance I had long awaited. Recovering from
24 cancer, I was unable to make either meeting, and I
25 lost my chance to be a part of what I see as the

1 most important fundamental change in agency theory
2 in a century. Now we face the impending
3 centennial of the Code of Ethics. I feel
4 compelled to write this paper in hopes it provides
5 a framework for future dialogue.

6 Do you see that?

7 A I do.

8 Q And you know in 2008, when she's talking
9 about this fundamental change in agency theory,
10 that's when NAR was involved in -- in a change
11 going from the subagency method of compensating
12 buyer's brokers to moving to the model that
13 requires a unilateral offer of cooperation and
14 compensation to pay the buyer's broker, correct?

15 MR. BIERIG: Objection to the form of the
16 question and the misstatement.

17 THE WITNESS: Say that again.

18 BY MR. KETCHMARK:

19 Q Sure. What did you understand the -- when
20 she's talking about this -- this fundamental
21 change in agency theory that happened in 2008,
22 what did you understand she was referring to?

23 A I thought --

24 MR. BIERIG: Object to the form of the
25 question.

1 BY MR. KETCHMARK:

2 Q Go ahead.

3 A I thought she was talking about the
4 proposed changes to the Code of Ethics that she
5 highlights at the top. When she talks about
6 listing agent, changing listing agent to seller
7 representative.

8 Q She says in 2008 --

9 A Um-hmm.

10 Q -- she had the honor of serving on the
11 committee chair, but she was unable to attend the
12 meeting, and she lost her chance to be part of
13 what I see as the most important fundamental
14 change in agency theory in a century.

15 A Right. This letter -- this paper talks
16 about changes to the Code of Ethics and changes to
17 MLS policy.

18 Q Right.

19 A The Professional Standards Committee would
20 not consider anything to do with the operation of
21 Multiple Listing Services.

22 Q Okay. On the next page, I want to focus
23 in on this paragraph of this document that you
24 would have received back in 2012.

25 The Sherman Antitrust Act is very clear

1 about price fixing. We all understand we cannot
2 set fees, other than our own. And there can be no
3 standardization, expressed or implied, regarding
4 fees of any nature.

5 Do you see that?

6 A I do.

7 Q Do you agree with that statement she made?

8 MR. BIERIG: Objection, calls for a legal
9 conclusion.

10 THE WITNESS: I'm not sure what you mean
11 by -- what she meant by "standardization."

12 BY MR. KETCHMARK:

13 Q Okay. Other than that, not understanding
14 that piece of it, do you agree with her statement?

15 MR. BIERIG: Again, objection, calls for a
16 legal conclusion.

17 THE WITNESS: I read that as basically
18 saying it's the listing broker's decision as to
19 what they will charge for their services.

20 BY MR. KETCHMARK:

21 Q It's not what I asked you. She says:

22 The Sherman Antitrust law is very clear
23 about price fixing.

24 Let's just break it down. Do you agree
25 with that statement she made?

1 MR. BIERIG: Object, calls for a legal
2 conclusion.

3 THE WITNESS: I -- I believe that's
4 correct.

5 BY MR. KETCHMARK:

6 Q She says: We cannot set fees other than
7 our own.

8 Do you agree with that?

9 A I do.

10 Q She states in here:

11 My contention is that the traditional
12 method of compensation of a seller and a broker
13 setting compensation to be paid to a cooperating
14 agent's company or firm is the ultimate form of
15 restraint of trade and indeed represents price
16 fixing in a free market.

17 Do you see that?

18 A I do.

19 Q She goes on, on the next page, and
20 actually provides a diagram saying:

21 Looking at the question in a visual sense,
22 the policy of compensation traditionally looked
23 like this.

24 And she has across the top: X apples.

25 And X apples have traditionally

1 represented the whole, which is subsequently
2 divided in whatever way the listing firm
3 determined. Historically, the division was 50/50,
4 although it was not meant to be accepted as
5 standardization, in other words, the fees look
6 like this: 50 percent and 50 percent.

7 Do you see that?

8 A I do.

9 Q And it says:

10 Over time the redistribution and
11 allocation of cooperative fees has evolved and due
12 to business practices has taken on a different
13 reflection.

14 Do you see where she states that?

15 A I do.

16 Q On the next page, she gives some more
17 diagrams, and she talks about the agent, seller's
18 listing agent is representing the seller of the
19 home, and the buyer's -- the agent -- the buyer's
20 listing agent is representing the buyer, and the
21 home is reflected there by "made out of money."

22 Do you see that?

23 A I do.

24 Q And she indicates:

25 Another way to look at the evolutionary

1 process by way of a visual is... And then she has
2 the money representing the house, and then at the
3 bottom, on one side, the seller and seller's
4 agent, on the other side, the buyer and buyer's
5 agent.

6 Do you see that?

7 A I do.

8 Q And what she is telling the National
9 Association of REALTORS, and the general counsel
10 at the time -- I mean -- back it up here.

11 Do you know that Miss -- what was her name
12 again, Janik?

13 A Janik, Laurene K. Janik.

14 Q Do you know, did she receive a copy OF
15 this proposal as well?

16 MR. BIERIG: Object --

17 THE WITNESS: No.

18 BY MR. KETCHMARK:

19 Q Okay. You didn't give it to her?

20 A No, sir.

21 Q So you're not practicing law at the time
22 for the National Association of REALTORS, correct?

23 A No, sir.

24 Q Meaning what I said was correct, right?

25 A Yes.

1 Q But you have a law degree?

2 A Yes.

3 Q And you had a woman who used to be in
4 leadership at the National Association of REALTORS
5 because that's what -- Ms. O'Connor had the
6 leadership position, correct?

7 A She was a committee --

8 MR. BIERIG: Object to the form of the
9 question, and the misstatement of --

10 THE WITNESS: Ms. O'Connor was a member of
11 a committee of about 112 people. I wouldn't call
12 her a leader, but she was a member.

13 BY MR. KETCHMARK:

14 Q Okay. And she was a member of the
15 Professional Standards Committee?

16 A Yes, sir.

17 Q So however many, several hundred thousand
18 million plus Realtors there were, you selected 112
19 of them to serve on the Professional Standards
20 Committee and she was one of those people?

21 A I don't select them. But she was selected
22 by the leadership of the National Association,
23 probably in response to a request from her local
24 association.

25 Q All right. And so this -- Ms. O'Connor is

1 telling you that she believes that the
2 compensation system that's being used, this
3 unilateral offer of cooperation and compensation,
4 in her words, is the ultimate restraint of trade.

5 That's what she tells you, correct?

6 A What page are you on?

7 Q That's on page -- that's on the page
8 that's numbered -- that ends with 7907. It would
9 the second page of the document.

10 A Thank you. I'm with you.

11 Q That's what she says, right?

12 A That's what she says.

13 Q And she's saying that she believes it's a
14 violation of the Sherman Antitrust price-fixing
15 laws, correct?

16 A She did.

17 Q And you're a lawyer?

18 A Yes, sir.

19 Q And you have a general counsel whose job
20 is to make sure that the National Association of
21 REALTORS is compliant with laws like the Sherman
22 Antitrust law, correct?

23 A Correct.

24 MR. BIERIG: Object to the form of the
25 question.

1 correct?

2 A I could have.

3 Q You could have sent her a fax. Her fax
4 number is there, correct?

5 A I could have.

6 Q In fact, if you didn't want to spend the
7 money to call her, you could have called her
8 toll-free and had a conversation with her about
9 it.

10 A I could have.

11 Q But you the didn't do that, did you?

12 A No, sir.

13 Q Nor did you forward this on to the general
14 counsel of your company, did you?

15 MR. BIERIG: Objection, asked and
16 answered.

17 THE WITNESS: No, I did not walk in and
18 hand it to the general counsel.

19 BY MR. KETCHMARK:

20 Q You didn't forward it by e-mail, did you?

21 A No, sir.

22 Q So big picture -- make sure that we're on
23 the same page.

24 What Linda O'Connor was telling the
25 National Association of REALTORS is she believed

1 the unilateral offer of compensation -- or the
2 unilateral offer of cooperation and compensation
3 was the ultimate form of a trade restraint, and it
4 represented a violation of the Antitrust Act.

5 That's what she was telling you, correct?

6 A That was part of what she was telling us.

7 Q Will you admit to the jury that when you
8 worked at the National Association of REALTORS
9 that you knew and understood that your
10 organization and its members were prohibited from
11 using the trade associations or its rules in an
12 anticompetitive manner?

13 MR. BIERIG: Object to the form of the
14 question.

15 THE WITNESS: Say that again.

16 BY MR. KETCHMARK:

17 Q Sure. Will you admit to the jury that
18 when you were employed at the National Association
19 of REALTORS, and certainly during this time period
20 in 2012, you knew and understood that the NAR and
21 its members were prohibited from using the trade
22 association and its rules in an anticompetitive
23 manner?

24 MR. BIERIG: Object to the form of the
25 question.

1 antitrust laws?

2 MR. BIERIG: Objection, calls for a legal
3 conclusion.

4 THE WITNESS: If -- I'm still having a
5 hard time following the question. Say it may be a
6 little slower.

7 BY MR. KETCHMARK:

8 Q Sure, I'll slow down.

9 Have you ever -- have you ever looked at
10 the Sherman Antitrust Act?

11 A I did when I was in law school, I assume.

12 Q But since you got out of law school, you
13 haven't read it?

14 A Probably not.

15 Q And so when Ms. O'Connor is telling you
16 that she believes it's the ultimate restraint on
17 trade, this rule, and - and that it violates the
18 Sherman Antitrust Act, I take it you would have no
19 position on that because you weren't -- it's
20 your -- you're saying you don't really know what
21 the law requires. Is that what you're telling me?

22 MR. BIERIG: Object to the form of the
23 question.

24 THE WITNESS: What I'm telling you is that
25 if this ever got to the point where it was going

1 to be considered by the relevant committee, we
2 would have looked into that, but it never got that
3 far.

4 BY MR. KETCHMARK:

5 Q Okay. And are you telling me that -- that
6 you don't have -- that you're not able to offer an
7 opinion one way or the other as to whether or not
8 it violates the Antitrust Act; is that what you're
9 telling me?

10 MR. BIERIG: Object to the form of the
11 question.

12 THE WITNESS: That what violates
13 the Antitrust --

14 BY MR. KETCHMARK:

15 Q This rule, this unilateral rule of
16 requiring cooperation and compensation.

17 MR. BIERIG: Object to the form of the
18 question --

19 THE WITNESS: I don't see.

20 MR. BIERIG: -- calls for a legal
21 conclusion.

22 THE WITNESS: It's not my -- I don't see
23 how it would.

24 BY MR. KETCHMARK:

25 Q But I'm asking you if you understand what

CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC

I, Cynthia J. Conforti, Certified
Shorthand Reporter No. 084-003064, CSR, CRR, and a
Notary Public in and for the County of Cook, State
of Illinois, the officer before whom the
foregoing deposition was taken, do hereby certify
that the foregoing transcript is a true and
correct record of the testimony given; that said
testimony was taken by me stenographically and
thereafter reduced to typewriting under my
direction; that reading and signing was requested;
and that I am neither counsel for, related to, nor
employed by any of the parties to this case and
have no interest, financial or otherwise, in its
outcome.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal this 2nd day of
February, 2022.

My commission expires: October 30, 2023



Notary Public in and for the
State of Illinois

Veritext Legal Solutions
1100 Superior Ave
Suite 1820
Cleveland, Ohio 44114
Phone: 216-523-1313

February 2, 2022

To: Mr. Bierig

Case Name: Burnett, Scott, Et Al. v. The National Association Of
Realtors Et Al.

Veritext Reference Number: 4995607

Witness: Clifford D. Niersbach Deposition Date: 1/26/2022

Dear Sir/Madam:

Enclosed please find a deposition transcript. Please have the witness
review the transcript and note any changes or corrections on the
included errata sheet, indicating the page, line number, change, and
the reason for the change. Have the witness' signature notarized and
forward the completed page(s) back to us at the Production address
shown

above, or email to production-midwest@veritext.com.

If the errata is not returned within thirty days of your receipt of
this letter, the reading and signing will be deemed waived.

Sincerely,

Production Department

NO NOTARY REQUIRED IN CA

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 4995607

CASE NAME: Burnett, Scott, Et Al. v. The National Association
Of Realtors Et Al.

DATE OF DEPOSITION: 1/26/2022

WITNESS' NAME: Clifford D. Niersbach

In accordance with the Rules of Civil
Procedure, I have read the entire transcript of
my testimony or it has been read to me.

I have made no changes to the testimony
as transcribed by the court reporter.

Date Clifford D. Niersbach

Sworn to and subscribed before me, a
Notary Public in and for the State and County,
the referenced witness did personally appear
and acknowledge that:

They have read the transcript;

They signed the foregoing Sworn
Statement; and

Their execution of this Statement is of
their free act and deed.

I have affixed my name and official seal

this _____ day of _____, 20____.

Notary Public

Commission Expiration Date

DEPOSITION REVIEW
CERTIFICATION OF WITNESS

ASSIGNMENT REFERENCE NO: 4995607

CASE NAME: Burnett, Scott, Et Al. v. The National Association
Of Realtors Et Al.

DATE OF DEPOSITION: 1/26/2022

WITNESS' NAME: Clifford D. Niersbach

In accordance with the Rules of Civil
Procedure, I have read the entire transcript of
my testimony or it has been read to me.

I have listed my changes on the attached
Errata Sheet, listing page and line numbers as
well as the reason(s) for the change(s).

I request that these changes be entered
as part of the record of my testimony.

I have executed the Errata Sheet, as well
as this Certificate, and request and authorize
that both be appended to the transcript of my
testimony and be incorporated therein.

Date

Clifford D. Niersbach

Sworn to and subscribed before me, a
Notary Public in and for the State and County,
the referenced witness did personally appear
and acknowledge that:

They have read the transcript;
They have listed all of their corrections
in the appended Errata Sheet;
They signed the foregoing Sworn
Statement; and
Their execution of this Statement is of
their free act and deed.

I have affixed my name and official seal
this _____ day of _____, 20____.

Notary Public

Commission Expiration Date